Supreme Court, U.S.
FILED
DEC 6 2002
CLERK

No. 02-695

In The

Supreme Court of the United States

MICHAEL FITZGERALD, Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD. and IOWA WEST RACING ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF OF THE CITY OF BETTENDORF, IOWA AND THE CITY OF DAVENPORT, IOWA AS AMICI CURIAE IN SUPPORT OF PETITIONER

GREGORY S. JAGER
City Attorney
Authorized Law Officer
CITY OF BETTENDORF
1609 State Street
Bettendorf, Iowa 52772

JOHN R. MARTIN
City Attorney
Authorized Law Officer
CITY OF DAVENPORT
226 West 4th Street
Davenport, Iowa 52801

DENNIS W. JOHNSON
Counsel of Record
MICHAEL C. GILCHRIST
DORSEY & WHITNEY LLP
801 Grand Avenue,
Suite 3900
Des Moines, Iowa 50309
(515) 283-1000

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. The Decision Below Opens the Floodgates to Equal Protection Challenges to Numerous State Tax Laws	2
II. The Iowa Supreme Court's Majority Opinion Conflicts with this Court's Precedent	5
III. No Adequate and Independent State Ground Supports the Iowa Supreme Court's Decision	11
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Am. Ass'n of Univ. Professors v. Cent. State Univ., 699 N.E.2d 463 (Ohio 1998) 12, 13

Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980) 12

Bowers v. Polk County Bd. of Supervisors, 638 N.W.2d 682 (Iowa 2002) 11, 12

Bruns v. Iowa, 503 N.W.2d 607 (Iowa 1993) 12

Cent. State Univ. v. Am. Ass'n of Univ. Professors, 526 U.S. 124 (1999) 13

Coalition for a Common Cents Solution v. Iowa, No. EQCV26737 (Iowa Dist. Ct. October 8, 2002) 3

Exira Cmty. Sch. Dist. v. Iowa, 512 N.W.2d 787 (Iowa 1994) 12

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 5, 7

Fed. Land Bank of Omaha v. Arnold, 426 N.W.2d 153 (Iowa 1988) 12

Flint v. Stone Tracy Co., 220 U.S. 107 (1911) 10, 11

Gleason v. City of Davenport, 275 N.W.2d 431 (Iowa 1979) 12

Heller v. Doe, 509 U.S. 312 (1993) 5

Hodel v. Indiana, 452 U.S. 314 (1981) 6, 9

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) 9

Krull v. Thermogas Co. of Northwood, Iowa, Div. of Mapco Gas Prods., Inc., 522 N.W.2d 607 (Iowa 1994) 12

TABLE OF AUTHORITIES – Continued

Page

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 3, 9, 10, 11

Michigan v. Long, 463 U.S. 1032 (1983) 2, 11

In re Morrow, 616 N.W.2d 544 (Iowa 2000) 12

Nordlinger v. Hahn, 505 U.S. 1 (1992) 2

Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928) 10

Rudolph v. Iowa Methodist Med. Ctr., 293 N.W.2d 550 (Iowa 1980) 12

Williams v. Vermont, 472 U.S. 14 (1985) 2

STATUTES & REGULATIONS

Iowa Code § 422.5(j)(2) 4

Iowa Code § 422.45(21) 4

Iowa Code § 422.45(27) 4

H.F. 2622, 79th Gen. Assem.,-Reg. Sess. (Iowa 2002) 4

33 C.F.R. § 175.1 et seq. (2000) 8

46 C.F.R. § 15.101 et seq. (1999) 8

46 C.F.R. § 67.1 et seq. (1999) 8

46 C.F.R. § 71.01 et seq. (1999) 8

INTEREST OF AMICI CURIAE

The City of Bettendorf, Iowa and The City of Davenport, Iowa ("the Cities"), Amici Curiae,[1] have a special interest in supporting the Petition for Writ of Certiorari. The Cities depend on state revenue sharing, and the decision below wreaks havoc with the State's budget by mandating a tax refund exceeding $100 million and the loss of over $40 million annually in future tax revenues. The Cities will suffer the effect of the resulting budget crisis. The fiscal crisis likely will be exacerbated as numerous other state tax statutes are challenged based on the Iowa Supreme Court's erroneous interpretation of federal equal protection law. Accordingly, the Cities urge this Court to review and correct the decision below.

SUMMARY OF ARGUMENT

The issue on Petition for a Writ of Certiorari is whether the Equal Protection Clause permits the State of Iowa to tax the revenue from all casino games, including slot machines, on floating riverboats at a rate lower than that imposed on slot machines at land based racetracks. For the reasons that follow, this Court should grant a writ of certiorari and hold that the Iowa Supreme Court erred in finding an Equal Protection Clause violation.

First, the court's decision opens the floodgates to equal protection challenges to numerous other tax statutes. Such

[1] Pursuant to Supreme Court Rules 37.4 and .6, no motion for leave to file this brief is required, as this brief is submitted on behalf of a city by its authorized law officer.

challenges threaten the operating budgets of state and municipal governments.

Second, the Iowa Supreme Court's decision conflicts with this Court's precedent mandating "rational basis" review of equal protection challenges to tax statutes. Because no fundamental right or suspect class is at issue, federal law requires that the legislature be given broad leeway under the rational basis test in determining the classes affected by tax legislation. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (citing *Williams v. Vermont*, 472 U.S. 14, 22 (1985)). When, as here, the classification is rationally related to a legitimate state end, the legislation is to be upheld as constitutional. *Id.* The Iowa legislature was entitled to tax water based and land based casino revenues at different rates for multiple reasons.

Third, this Court may grant Certiorari to correct a state court ruling misconstruing the federal constitution when, as here, there is no adequate and independent state law ground for the judgment below. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). The Iowa Supreme Court applies the same analysis in reviewing equal protection claims under both the federal and Iowa constitutions. Accordingly, reversal of its erroneous federal ruling necessarily reverses the judgment below.

ARGUMENT

I. The Decision Below Opens the Floodgates to Equal Protection Challenges to Numerous State Tax Laws.

This Court has traditionally given considerable deference to the States in designing their tax systems.

This deference comes from recognition of the authority of State legislatures to consider numerous factors in setting taxes, including economic incentives to promote or discourage certain types of activities, incentives to encourage development, and other economic, historic, and geographic factors. This Court has specifically recognized that, because of these various factors, legislatures can set different tax rates for revenues derived from the same types of services provided by different classes of taxpayers. *See Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 358 (1973).

The decision of the Iowa Supreme Court turns this tradition on its head. By holding that tax rates on slot machines at land-based race tracks must be the same as tax rates on all gaming operations, including slot machines, at riverboat casinos, the Iowa Supreme Court has disregarded or misapprehended longstanding precedent. If this Court denies certiorari, it would essentially allow the Iowa Supreme Court to nullify *Lehnhausen*, and require the Iowa legislature to tax equally all businesses offering a particular service regardless of any independent economic, historic or geographic considerations. The result: endless litigation over legislative line-drawing in tax statutes. Litigation has already been filed in *Coalition for a Common Cents Solution v. Iowa*, No. EQCV26737 (Iowa Dist. Ct. October 8, 2002) (Pet. App. at 71-76) challenging the constitutionality of Iowa Code Chapter 422E, a local option sales tax. The opinion below opens numerous other statutes to challenge. The *Coalition* lawsuit is only the first of many anticipated challenges to the legislature's enactment of differential tax rates.

For example, the following Iowa statutes could face equal protection challenges under the Iowa Supreme

Court's new analysis. *See* Iowa Code §§ 422.5(j)(2) (providing the benefit of apportionment to the taxable income of resident shareholders of S Corporations, but not partners, shareholders or members of partnerships, C Corporations or limited liability companies); 422.45(21) (providing an exemption from the tax imposed on the sale of tangible personal property for "printers" engaged in the sale of certain printing materials, but no similar exemption for other businesses selling the same printing materials); 422.45(27) (providing an exemption on the gross receipts from the sale of "computers used in the processing or storage of data or information by an insurance company, financial institution, or commercial enterprise," but not for computers used for processing or the storage of data by a profession, occupation or nonprofit organization); H.F. 2622, 79th Gen. Assem., Reg. Sess. (Iowa 2002) (providing for the abatement of "unpaid sales and use taxes and local sales and services taxes owed by any foundry located in Lee or Jefferson county on the purchase of tangible personal property used by the foundry in making patterns, molds, or dies which purchases occurred between July 1, 1997" and May 6, 2002, without abating taxes on foundries located in other counties).

This litigation quagmire should be averted by this Court's reversal of the decision below. The potential ramifications from this case are not confined to Iowa. If the decision of the Iowa Supreme Court is allowed to stand as a valid interpretation of the Equal Protection Clause, it will serve as support for similar challenges to other states' tax schemes as well. As this Court's precedents have made clear, the line-drawing in these tax schemes should be performed by legislatures, not courts, and the Iowa court's decision in this case must be corrected.

II. The Iowa Supreme Court's Majority Opinion Conflicts with this Court's Precedent.

In the area of "economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a reasonable basis for the classification*." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added). So long as a "plausible reason" exists for the legislative action, no further inquiry should occur. *Id.* at 313-14. Further, classifications which do not involve a suspect class or fundamental right are afforded a strong presumption of validity. *Heller v. Doe*, 509 U.S. 312, 319 (1993). Thus, a classification will "not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequity." *Id.* at 321.

The Respondents' burden was to negate "every conceivable basis which may support 'the legislative reason for the enactment.'" *Beach Communications*, 508 U.S. at 315. The Petitioner advanced several reasonable bases for the differential tax. The district court agreed that Respondents "failed to negate every conceivable basis for upholding the taxing statute." Pet. App. at 5. The Iowa Supreme Court majority not only performed independent factfinding, but improperly considered how post-enactment economic events purportedly contradicted the alleged legislative purpose. *Id.* at 8-9; 12-13. The majority seized on one of many possible purposes for the legislation – "to help the racetracks recover from economic distress" – and concluded the state flunked the rational basis test because the higher tax rate hurt the racetracks financially in subsequent years. *Id.* at 10-13.

The majority ignored the legislature's judgment that the racetracks were better off with slot machine revenue (albeit more heavily taxed) than without any slot machine revenue at all. Iowa's decision to give racetracks the authority to operate slot machines was unprecedented at the time – no state in the country had ever taken such action. The racetracks jumped at the opportunity and have made hundreds of millions of dollars as a result. This case displays a perfect example of legislative responsibility: attempt to balance the interests of the racetracks, riverboats, local communities, the State treasury, and anti-gambling groups, to find a way to best promote the interests of the citizens of the State as a whole.

In essence, the majority substituted its policy judgment for that of the legislature. Such a substitution violates rational basis review. *See Hodel v. Indiana*, 452 U.S. 314, 331, 333 (1981) (noting that in substituting its policy judgment for that of the legislature, the court acted as a superlegislature and improperly passed "on the wisdom of congressional policy determinations").

The purpose of rational basis review is to determine whether a reason for the differential tax treatment is plausible at the time the statute was enacted, not whether such a legislative purpose remains valid years later. The legislature is not a soothsayer, and it is inappropriate for the court to review a statute using hindsight. The Iowa court's majority essentially concocted a "back to the future" test in which it second-guessed legislative policy choices in light of subsequent events. This standard is unworkable and subjects a broad array of statutes to equal protection challenge.

At the time the statute was enacted, a rational legislator could have found a number of valid reasons to tax riverboat casino and racetrack slot revenue differently. The majority below disregarded the admonitions of this Court in *Beach Communications*:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of "legislative facts" explaining the distinction "[o]n the record," has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and ability to function."

508 U.S. at 315 (quoted citations omitted).

The dissent below correctly recognized several valid reasons the legislature could have had for taxing gaming revenue from riverboat casinos at a different rate than the land-based racetracks:

> Riverboats are not the same as racetracks. From an entertainment perspective, they speak to different cultural traditions – river lore versus agriculture. The majority questions these distinctions once gaming is attached to the enterprise. But there is no constitutional impediment to a legislature favoring diversity in cultural attractions for its citizens and tourists. And, rightly or wrongly, a legislative majority could rationally

> determine that a riverboat casino holds more romantic tourist appeal than a casino stuck in a dog track.
>
> To advance these policy decisions, a reasonable legislature would also want to recognize a very pragmatic distinction between the two gambling venues: riverboats are mobile, racetracks are not. If the economic climate turns unfavorable here, a riverboat merely unties its lines and sails elsewhere. So it is not unreasonable for the legislature to create economic incentives to develop or retain riverboat gambling while maintaining the status quo with respect to other forms of the sport.

Pet. App. at 18 (Neuman, J., dissenting). Legislators also could have chosen to favor riverboat casinos over land-based slot machine parlors because the former draw a larger number of tourists from border states. In addition, rational legislators could have considered the fact that water-based casinos have significantly higher operating costs than land-based racetracks.[2]

---

[2] Floating riverboat casinos are subject to extensive government regulation, including additional equipment requirements, such as availability and maintenance of personal flotation devices, visual distress signals, markings and ventilation equipment; increased documentation and certification and inspection of equipment, hull, boilers and machinery; and increased manning requirements including a master, mates, pilots, engineers, radio and staff officers, and seamen. *See generally*, 33 C.F.R. § 175.1 et seq. (2000) (equipment requirements); 46 C.F.R. § 15.101 et seq. (1999) (crew manning requirements); 46 C.F.R. § 67.1 et seq. (1999) (documentation of vessel requirements); 46 C.F.R. § 71.01 et seq. (1999) (inspection and certification requirements). In addition to these federally mandated requirements, floating casinos incur additional practical operational costs associated with fuel

(Continued on following page)

The majority concluded that the goal of raising revenue "is not rationally served by a taxing scheme that discriminates against certain slot machines simply because of their geography." *Id.* at 14. This conclusion conflicts with this Court's precedent. Geography can indeed play a role in determining the economic or fiscal status of a person or organization to permit differing tax rates. *See Hodel*, 452 U.S. at 333 (holding legislation providing different coal mining restrictions based on geographic location did not violate equal protection clause; "[a] claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70-71 (1978) (stating the Equal Protection Clause does not prohibit legislation merely because it limits its application to a particular geographical region of a state).

Moreover, the majority erred by holding the same activity performed by different classes of business cannot be taxed at different rates. This Court has duly noted that "where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 358 (1973). In *Lehnhausen*, this Court upheld an Illinois taxing statute which imposed a higher tax on property owned by corporations than that same property owned by individuals. In reversing the Illinois Supreme

---

consumption, higher insurance rates due to the risk of sinking, and increased costs associated with compliance with the laws of multiple jurisdictions.

Court, this Court specifically noted the words of Mr. Justice Holmes in his dissenting opinion in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 403 (1928):

> If usually there is an important difference of degree between the business done by corporations and that done by individuals, I see no reason why the larger business may not be taxed and the small one disregarded, and I think it would be immaterial if here and there exceptions were found to the general rule. . . . Furthermore, if the State desired to discourage this form of activity in corporate form and express its desire by a special tax, I think that there is nothing in the Fourteenth Amendment to prevent it.

Lehnhausen, 410 U.S. at 361 (quoting *Quaker City Cab*, 277 U.S. at 403 (Holmes, J., dissenting)). Further, in *Lehnhausen*, this Court quoted at length *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), in which the Court stated:

> It could not be said . . . that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. . . . It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals.

Lehnhausen, 410 U.S. at 361-62 (quoting *Flint*, 220 U.S. at 161-62). Thus, this Court has long recognized that states can tax at different rates revenue from the same service provided by different classes of businesses. The majority opinion below erred in holding that the state tax scheme violated the Equal Protection Clause by levying a higher rate on land-based casinos than that levied on riverboat casinos floating on the state's border rivers.

The majority opinion is strikingly out of step with federal Equal Protection jurisprudence and cries out for reversal.

III. No Adequate and Independent State Ground Supports the Iowa Supreme Court's Decision.

There is no impediment to this Court reviewing the Iowa Supreme Court's decision, even though that decision considered, in part, the Iowa Constitution. This Court may grant certiorari if no adequate and independent state ground exists for the holding below. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). This Court will assume "there are no independent state grounds when it is not clear from the opinion itself that the state court relied on an adequate and independent state ground and when it fairly appears the state court rested its decision primarily on federal law." *Id.* at 1042 (concluding that references to state constitution did not constitute independent state ground for that decision).

No adequate and independent state ground exists to support the decision below. The Iowa Supreme Court has repeatedly held that the Iowa and federal equal protection clauses are deemed "to be identical in scope, import and purpose." *Bowers v. Polk County Bd. of Supervisors*, 638

N.W.2d 682, 689 (Iowa 2002); *Exira Cmty. Sch. Dist. v. Iowa*, 512 N.W.2d 787, 792 (Iowa 1994). Further, Iowa's high court applies the "same analysis" to state equal protection claims as is applied to federal claims. *Bowers*, 638 N.W.2d at 689; *Krull v. Thermogas Co. of Northwood, Iowa, Div. of Mapco Gas Prods., Inc.*, 522 N.W.2d 607, 614 (Iowa 1994); *Bruns v. Iowa*, 503 N.W.2d 607, 609 (Iowa 1993); *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 557 (Iowa 1980). Indeed, the decision below reiterated, "Iowa courts are to 'apply the same analysis in considering the state equal protection claims as ... in considering the federal equal protection claim.'" Pet. App. at 6 (quoting *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000)). Every Iowa equal protection case cited in the decision below reached the same conclusion.[3]

This Court has not hesitated to grant certiorari and reverse a state supreme court decision expressly based on both federal and state equal protection grounds when, as here, the state's high court applies the same analysis in construing the state constitution and misinterpreted federal precedent. In *American Ass'n of University Professors v. Central State University*, 699 N.E.2d 463 (Ohio 1998), the Ohio Supreme Court held that a state statute

[3] *See Bowers*, 638 N.W.2d at 689 (holding the same analysis applies to federal and state equal protection claims); *Morrow*, 616 N.W.2d at 547 (Iowa 2000) (same); *Fed. Land Bank of Omaha v. Arnold*, 426 N.W.2d 153, 156 (Iowa 1988) (same); *Bierkamp v. Rogers*, 293 N.W.2d 577, 580 (Iowa 1980) (noting the standard for equal protection review stems from federal law); *Gleason v. City of Davenport*, 275 N.W.2d 431, 435 (Iowa 1979) (stating an unreasonable classification which lacks a reasonable relationship to a legitimate state interest violates both state and federal constitutions).

violated the equal protection clauses of *both* the State and Federal Constitutions, *id.* at 470, just as the Iowa Supreme Court did in the case at bar. The Ohio Supreme Court, just like Iowa's high court, applies the same analysis in determining whether a statute allegedly offending the federal Equal Protection also violates the state constitution. *Id.* at 467 ("These two provisions are functionally equivalent, and the standards for determining violations of equal protection are essentially the same under state and federal law.") This Court, concluding that the Ohio Supreme Court had misinterpreted federal law, reversed per curiam. *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124 (1999). Just as this Court found no independent state ground precluding review in that case, it should grant the Petition for a Writ of Certiorari here.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted and the decision of the Iowa Supreme Court reversed.

Respectfully submitted,

GREGORY S. JAGER
City Attorney
Authorized Law Officer
CITY OF BETTENDORF
1609 State Street
Bettendorf, Iowa 52772

JOHN R. MARTIN
City Attorney
Authorized Law Officer
CITY OF DAVENPORT
226 West 4th Street
Davenport, Iowa 52801

DENNIS W. JOHNSON
Counsel of Record
MICHAEL C. GILCHRIST
DORSEY & WHITNEY LLP
801 Grand Avenue, Suite 3900
Des Moines, Iowa 50309
(515) 283-1000

Counsel for Amici Curiae